

Recognition and Protection of Environmental Migrants in International Law

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CHIARA SCISSA, JUN 24 2021

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It was only in the 1990s that global concerns over environmental changes began to acquire the dimension of a humanitarian issue with massive effects on the well-being and safety of vulnerable populations. In the following decade, international experts and regional bodies provided different regulatory solutions aimed at recognizing and protecting people compelled to flee on environmental and climate grounds. However, these solutions have neither produced an internationally agreed definition of environmental migration nor common assistance and protection arrangements. No groundbreaking policy element was introduced in the international debate on environmental migrants until 2015 with the adoption of the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change. The 2030 Agenda on Sustainable Development revitalized interest in and awareness of the causal nexus between environmental threats and migration, then reaffirmed in several United Nations (UN) soft law instruments. Despite this initial policy breakthrough, supported by relevant case law at all levels, the international regulatory process on environmental migration gets jammed again as a consequence of the overall lack of states' commitment to tackling climate change and granting protection to wider categories of forced migrants.

The Urgency of Raising Awareness

Human migration has always been linked to the environment, but political awareness of the importance of this factor is recent (IOM 2008). Indeed, only in the 1990s did global concerns of environmental changes begin to acquire the dimension of a humanitarian issue with massive effects on the well-being and safety of vulnerable populations. In the following decade, international experts and regional bodies provided different regulatory solutions aimed at recognizing and protecting people compelled to flee on environmental and climate grounds.

Still, the international community is far from reaching consensus on the definition to apply to this category of migrants and the protection status to which they should be entitled. Between the end of 20th century and the beginning of the 21st century, five proposals to define and assist environmentally displaced people gained particular attention. These were: 1) extending the 1951 Convention Relating to the Status of Refugees; 2) adding a protocol on climate refugees to the United Nations Framework Convention on Climate Change (UNFCCC); 3) adopting a new legal framework; 4) promoting the Guiding Principles on Internal Displacement; and 5) using temporary protection mechanisms. However, none of them succeeded in convincing heads of state to process them further.

Extending the 1951 Refugee Convention

UN Environment Programme researcher Essam El-Hinnawi (1985) first proposed extending refugee status to people compelled to flee from environmental disasters. At the beginning of the 21st century, University of Oxford Professor Norman Myers (2001) supported the extension of the 1951 Refugee Convention to environmental refugees.

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However, this first proposal has been swiftly dismissed, since few requirements under Article 1A of the 1951 Refugee Convention would potentially be fulfilled by such a category (McAdam 2011). The traditional definition of a 'refugee' indeed requires the applicant to be outside the country of their nationality or of habitual residence. Firstly, it has been recognized that most people affected by the environment remain within their country of origin, thus not meeting this preliminary requirement (Nansen Initiative, 3). Secondly, it is difficult to prove the risk of persecution due to climate change or to qualify climate change as an agent of persecution pursuant to the 1951 Refugee Convention. In the well-known Teitiota case, the applicant's request for asylum in New Zealand was based on the fact that the international community, industrialized countries in particular, failed to limit greenhouse gas emissions, which, according to the claimant, led to drastic climate change effects in Kiribati. However, the High Court of New Zealand noted that 'there are many decisions rejecting claims by people from Kiribati, Tuvalu, Tonga, Bangladesh, and Fiji on the grounds that the harm feared does not amount to persecution, and there were no differential impacts on the applicants' (Teitiota v. Chief Executive of the Ministry of Business, Innovation and Employment 2015). Thirdly, even if the impacts of climate change could be considered persecutory acts, the 1951 Refugee Convention requires such persecution to be on account of race, religion, nationality, political opinion, or membership of a social group, while the impacts of climate change are largely indiscriminate, rather than tied to personal characteristics. Therefore, environmental threats and their drastic effects on human rights can be seen as a further reason to issue refugee status, but not the only one.

Adding a Protocol on Climate Refugees to the UNFCCC

Although some scholars (Biermann and Boas 2010), institutions (German Advisory Council on Global Change 2007), and non-governmental organizations (Environmental Justice Foundation 2017) support the use of the term 'environmental/climate refugees', they are reluctant to extend the scope of the 1951 Refugee Convention. Utrecht University Professor Frank Bierman, and Wageningen University Professor Ingrid Boas paved the way for an alternative proposal, concerning the establishment of an *ad hoc* climate refugee convention to be included as a protocol to the UNFCCC. However, they meant to distinguish strictly between climate change and environmental drivers of forced migration, thus impeding their proposal from gaining traction. Indeed, a conceptual and legal distinction between environmental and climate change disasters triggers multiple backlashes. For instance, science has so far not provided for a clear distinction between pure environmental and climate change threats. Even so, states might issue protection statuses more cautiously to the victims of disasters, in order to be sure that the applicant has been affected by pure climate change actions only. This would also lead to more categories and sub-categories of migrants, making efforts to address their vulnerability less efficient.

Adopting a New Legal Framework

Alternatively, other scholars have opted for the creation a new international instrument to protect environmental migrants, as suggested by a Resolution No. 1655/2009 and recommendation No. 1862/2009 of the Committee on Migration, Refugees and Populations together with the Committee on Environment, Agriculture and Regional Affairs of the Parliamentary Assembly of the Council of Europe. Other outstanding experts endorsed this third approach. For instance, University of Limoges law specialists proposed to draft a new convention for environmentally displaced persons (Prieur et al. 2008), while Harvard Law School Professors Bonnie Docherty and Tyler Giannini (2009) promoted the establishment of a new, legally binding instrument based on human rights and shared responsibility in order to protect 'climate change refugees'. They defined a climate change refugee as 'an individual who is forced to flee his or her home and to relocate temporarily or permanently across a national boundary as the result of sudden or gradual environmental disruption that is consistent with climate change and to which humans more likely than not contributed' (Docherty and Giannini 2009, 378). In focusing purely on climate change threats, they reproduced the separation already introduced by Biermann and Boas, thus weakening the consistency and pragmatism of their proposal.

Nonetheless, University of New South Wales Scientia Professor of Law Jane McAdam (2011) has highlighted the reasons why environmental migrants may not benefit from a new international treaty or protocol. According to her, they might address neither their specific needs nor the causes of climate change in different regions around the world, given that climate change affects people differently, and the remedies or anticipatory strategies could diverge. To this end, she argues, local or regional responses would be better able to respond to their exigencies.

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Promoting the Guiding Principles on Internal Displacement

The fourth proposal refers to the 1998 Guiding Principles on Internal Displacement (United Nations Office for the Coordination of Humanitarian Affairs 1988), a landmark development in the process of establishing a normative framework outlining protection, assistance, and rights for the protection of internally displaced persons (IDPs). However, the Guiding Principles only provide guidelines and lack of legal force. To produce binding obligations, they should be incorporated at the domestic level. For instance, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) embeds relevant principles of international human rights and humanitarian law set out in the 1998 Guiding Principles. The Kampala Convention also explicitly refers to internal displacement due to natural or human-made disasters, including climate change. Moreover, it contains provisions not only for protection and humanitarian assistance for IDPs, but also legal and practical steps to avoid environmental displacement, as well as to provide satisfactory conditions for sustainable return, relocation, and local integration. To date, alas, only 27 out of 55 state parties have ratified the Kampala Convention and few tangible attempts to implement its provisions have been made.

An interesting effort to revitalize the Kampala Convention has been made by Narayan Subramanian and Johns Hopkins University Professor Johannes Urpelainen, who use game theory to study when regional treaties are feasible to address cross-border environmental displacement. According to their theory, two states benefit from mutual collaboration when both are affected by environmental threats and, therefore, when they find themselves in a condition of vulnerability (Subramanian and Urpelainen 2013). In their opinion, a regional treaty, such as the Kampala Convention, can provide cooperation and solidarity against a common threat. Nevertheless, when states do not have enough governance capacity to accept environmentally displaced from neighboring states, or are equally affected by climate change, regional treaties may not help either of them.

Using Temporary Protection Mechanisms

The last proposal concerns temporary protection measures to assist and protect those displaced by environmental events, combined with planned relocation and resettlement programs to reduce the vulnerability of affected populations. At the EU level, several countries have adopted various forms of temporary protection status in their domestic legislations that deal, or could deal, with environmental issues. A 2020 European Migration Network study shows that there are currently 60 national protection statuses, mostly based on humanitarian reasons, which, however, remain largely undefined in national legislation (European Migration Network 2020, 1). This leaves a significant margin of discretion to national authorities in assessing applications owing to environmental drivers.

Postponing Commitments: Recognizing Environmental Migration through Soft Laws

Although relevant, none of the previously mentioned proposals has been met with international consensus. This regulatory and policy limbo leaves a disproportionate number of people to struggle with environmental and climate disasters, exacerbating their vulnerability, poverty, and food and water insecurity. From the beginning of the 21st century, no ground-breaking policy element was introduced in the international debate on environmental migrants until 2015, when the adoption of the Agenda for the Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change (Protection Agenda) and the 2030 Agenda on Sustainable Development revitalized interest in and awareness of the nexus between environmental threats and migration.

The Protection Agenda encourages states to identify measures for the protection and assistance of transnational disaster-displaced persons. Rather than negotiating a new international agreement, the Protection Agenda stresses the need for states to support the integration of effective practices at national and sub-regional levels into their own normative frameworks in accordance with their specific situations and challenges. In doing so, it seems to be in line with the fifth proposal, namely promoting domestic solutions to environmental migration. In providing a comprehensive, high-quality, and pragmatic legal and policy analysis of environmental migration, the Protection Agenda helps states also by giving effect to the 2030 Agenda on Sustainable Development, whose aim is to leave no one behind. The latter recognizes that the adverse impacts of climate change and environmental degradation represent a cause of forced migration. It therefore calls on states to provide adequate solutions to climate change

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and to protect people affected by it, both within and across their territories.

Similarly, the 2016 New York Declaration for Refugees and Migrants explicitly identifies environmental disasters as causes of forced migration (par. 1, and 7 of Chapter II in Annex II), and pledges signatory states to address their adverse impacts. The related Global Compact for Safe, Orderly, and Regular Migration (GCM) also represents a relevant breakthrough, as it is the first ever inter-governmentally negotiated agreement that simultaneously recognizes environmental disasters as drivers of forced migration as well as the urgency to provide protection to their victims (Scissa 2019). Most importantly, the GCM's Objective 5 calls on participating states to use protection mechanisms 'based on compassionate, humanitarian, or other considerations for migrants compelled to leave their countries of origin owing to sudden-onset natural disasters', as well as to devise planned relocation. In doing so, the GCM confirms the environment to be a cause of forced migration, but not of refugee movements. At the same time, the Global Compact on Refugees further stresses this conceptual and regulatory separation, by clearly asserting that environmental threats cannot be seen as valid grounds for the application of the Refugee Convention (Introduction, D8), but rather as an exacerbating factor of forced migration.

Despite this initial policy breakthrough, all these innovative UN instruments lack binding force, thus failing to generate strong binding commitments. What is more, several states have refrained from adopting the GCM, thus weakening its potential to foster cooperation in the realm of migration governance. The 2020 Sustainable Development Goals Report notes that only 54 percent of countries have established adequate migration policies to reduce inequalities and vulnerability (United Nations 2020), while feeble actions have been undertaken to tangibly tackle climate change. Remarkably, the last Conference of the Parties (COP25) in Madrid failed to produce common rules for implementing the 2015 Paris Agreement for Climate Change, with which the international community marked its commitment to reducing greenhouse gas emissions on the one hand, and to enhance concerted actions to limit the adverse impacts of climate change on the other. Given that the majority of states are also way off-track to meet the Paris Agreement's 2° Celsius target, it seems that national, short-term economic and political interests are making states reluctant to deal with two of the biggest challenges of our time. The overall lack of states' commitment in tackling climate change and in granting protection to wider categories of forced migrants is visible not only at the international level, with the United States withdrawing from the Paris Agreement, as well as at the EU level, where the negotiation process among member-states on humanitarian visas, common resettlement programs, and an overdue reform of the Common European Asylum System has been in a deadlock for the past five years.

Beyond National Interests: States' Binding Obligations

As stated elsewhere, the common issue for the protection of environmental migrants should be the official recognition of the issue (Scissa 2019). Jurisprudence, international, and regional binding and non-binding instruments indicate that environmental threats represent both a breach of human rights and a driver of forced migration. They also suggest that states should combine their obligations under international environmental law to those related to international human rights law, as the two issues are inevitably interlinked.

Indeed, with regard to law enforcement, the UN Human Rights Council (UN Human Rights Council 2009), the African Commission on Human and Peoples' Rights (*SERAP v. Nigeria* 2012), the Inter-American Commission on Human Rights (Inter-American Commission on Human Rights 1997), and the European Committee of Social Rights (*MFHR v. Greece* 2006) found the environment to be a fundamental component of the right to life and health. Additionally, in the *Urgenda* climate case, the Supreme Court of the Netherlands has recently held that the Dutch government has binding legal obligations to prevent climate change damage, and by implication all governments do as well, under international human rights law (*Urgenda Foundation v. the Netherlands* 2019). Therefore, the next reasonable step should be to agree internationally on a comprehensive definition of environmental migrants to provide them with adequate protection mechanisms in full compliance with their human rights.

Protecting Environmental Migrants to Comply with International Law

In light of international human rights law, international customary principles, and international environmental law, states should overcome their attitude of postponement to comply with their international obligations. Environmental

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degradation, natural and anthropogenic changes in the climate and soil composition, and severe weather events are gravely affecting human rights, such as the rights to life, adequate food and water, health, housing, property, culture, the freedom of movement, and the principle of *non-refoulement*, among others.

In particular, the latter, enshrined in Article 33 of the 1951 Refugee Convention, prevents states from returning individuals to areas where they could face serious harm or where their life could be at risk. It is at the core of international and regional arrangements, as well as of discretionary measures aimed at preventing the deportation of an individual whose life and freedom could be in danger. This *jus cogens* principle is also embedded in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the International Covenant on Civil and Political Rights (ICCPR, Article 7) and the European Convention on Human Rights (ECHR, Article 3). Most importantly, in the case *Teitiota v. New Zealand*, the UN Human Rights Committee claimed that if the applicant's right to life is threatened because of the effects of climate change, s/he cannot be refouled (UN Human Rights Committee 2020).

The rights to life and to a healthy environment mutually reinforce one another. Indeed, protecting the environment is indispensable for the full enjoyment of the right to life, health, and an adequate standard of living, while human rights further foster the need of a safe and healthy environment. The right to life does not solely prevent states from deliberately taking life, but also obliges them to take positive measures to properly protect life under their jurisdiction. In this regard, the Inter-American Commission on Human Rights has recognized that the realization of the right to life is necessarily linked to and dependent on the physical environment (*Yakye Axa v. Paraguay* 2005). Similarly, the African Commission on Human and Peoples' Rights found a violation of the right to health and the right to life as a result of displacement from lands in Mauritania, which were confiscated by the government (*Malawi African Association v. Mauritania* 2000). The opinion that environment and human rights are inextricably linked has been further confirmed by the International Court of Justice Judge Christopher Weeramantry, who has stated that 'the protection of the environment is... a vital part of... the right to health and the right to life itself' (Office of the Persecutor International Court of Justice 2016).

Furthermore, the UN Commission on the Economic, Social, and Cultural Rights saw the right to water as essential for conducting a dignified life (UN Committee on Economic, Social, and Cultural Rights 2002). According to University of Bologna Professor Marco Borraccetti (2016, 119), the right to water not only corresponds to one of the most fundamental conditions for survival, but is also crucial for the concrete enjoyment and realization of other key human rights, such as an adequate standard of living, food, clothing, and housing.

The right to health is enshrined in Article 25 of the Universal Declaration of Human Rights (UDHR) and restated in many other international arrangements, such as in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). At the regional level, neither the European Charter nor the European Social Charter contain provisions related to the right to a healthy environment. However, the European Committee of Social Rights (the Committee) has interpreted Article 11 of the European Social Charter, which specifically refers to the right to the protection of health, as including the right to a healthy environment. The Committee, in fact, found a complementarity between Article 11 of the Social Charter and Articles 2 and 3 of the ECHR. Consequently, in several conclusions regarding the right to health, the Committee explicitly stated that the provisions contained in Article 11 of the Social Charter should be duly considered in order to remove the causes of ill health also resulting from environmental threats. In the already mentioned decision on the Marangopoulos case, the Committee identified environmental protection as one of the key elements of the right to health under Article 11. The Committee also affirmed that states are responsible for activities that are harmful to the environment, whether carried out by the public authorities themselves or by a private company. Importantly, Article 16 of the African Charter deals with the right to health, whereas Article 38 of the Arab Charter explicitly recognizes the right to a healthy environment. Furthermore, Article 24 of the African Charter, by including a right to a 'satisfactory environment' favorable to development, has been interpreted as the first binding international obligation relating to the right to the environment (Ebeku 2003).

Protecting the environment and people living therein also leads to the promotion of the right to property as enshrined in Article 17 UDHR, Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the African Charter, Article 21 of the American Convention on Human Rights, Article 31 of the Arab Charter, and

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Article 1 of Protocol No. 1 to the ECHR. In particular, these instruments affirm that individuals are entitled to peacefully enjoy their possessions. These instruments not only concern the unlawful deprivation, exploitation, and disposition of property, but also encompass the right to land and to land use. While there is currently no explicit reference to a human right to land under international human rights law, several international arrangements consider the enjoyment of land as strictly relevant for the full respect of other recognized human rights, such as the right to food, equality between women and men, the protection and assistance of IDPs, and the rights of indigenous peoples and their relationship with their ancestral lands or territories (UNHCR 2015).

Concluding Remarks

It has been no less than 30 years since the debate around environmental migration started flourishing. After two decades, scholars and institutions still refer to the protection of this still blurry category of migrants as an urgent and humanitarian issue to be managed with timely, well-planned responses. Several UN arrangements explicitly recognize environmental migration, but lack of binding force. Conversely, binding instruments that provide protection statuses to environmental migrants, such as the Kampala Convention, are too weakly implemented, while the Paris Agreement does not refer to people affected by climate change. This chapter aimed firstly at summarizing the pros and cons of the most relevant advanced proposals, as well as recent international declarations, stepping up for ensuring protection to environmental migrants. Then, it pointed out that the fulfilment of certain human rights, essential to a dignified life, depends on a healthy and protected environment. Finally, it argued for the urgent need to overcome states' attitude of postponement in light of their international responsibility to protect human rights and fundamental freedoms.

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